CONFIDENTIAL
RULE 408 SETTLEMENT COMMUNICATION

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**CORRECTED**
July 2, 2015

**VIA EMAIL**
**and U.S. MAIL**
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Re: Gilt Edge Mine Site, Lawrence County, South Dakota
Nelson Tunnel Site, Mineral County, Colorado

Dear Heidi and Andrea:

As you know, CoCa Mines Inc. ("CoCa") and Hecla Limited ("Hecla") have been working for some time with you both towards a settlement of the claims of the United States and South Dakota (collectively "the governments") for recovery of CERCLA response costs related to the Gilt Edge Mine Site in Lawrence County, South Dakota (the "Site" or "Gilt Edge"). CoCa and Hecla appreciate the continued cooperation of the governments, while the parties have evaluated the governments' claims and explored potential avenues for resolution. The time spent in the past year has been particularly productive in moving these discussions towards closure. We were glad we were able to bring Mr. Tom Congdon into these negotiations to try to resolve the governments' claims against CoCa, Hecla and Mr. Congdon at Gilt Edge in a single final settlement. We also have made additional progress with the insurance carriers. In light of these efforts and commitments, CoCa, Hecla and Mr. Congdon are now able to offer the governments

a settlement offer valued at $17.2 million, to resolve the governments' response cost claims at Gilt Edge and as to Hecla, CoCa and their affiliates at the Nelson Tunnel Superfund Site.[1] We do not understand EPA to have any claims against Mr. Congdon personally at the Nelson Tunnel Site.

This offer consists of $16.3 million in cash payments to be made on an agreed upon payment schedule, presumably under two consent decrees, one for each site. As we have discussed, CoCa also is willing to file and expeditiously prosecute a lawsuit to recover indemnity proceeds on a $1 million insurance policy issued by its one non-cooperating insurer. The governments would receive the first $400,000 of the insurance proceeds recovery on that policy, and then split with CoCa any additional proceeds recovered on a 50/50% basis, for a potential total recovery of $700,000. The former millsite property in Creede, Colorado, which has an estimated value of approximately $200,000, would also be included in the settlement. The settlement will resolve liability for response costs at both sites and provide the settling parties with contribution protection.

We do hope the governments find these terms acceptable, as there simply is no more money to be had, from these PRPs or the cooperating insurers. These parties believe that our proposed settlement is fair, just and in the public interest, given the facts, equities and litigation risks at these two sites. Because these settlement discussions have occurred and evolved over a considerable period of time, we want to take this final opportunity to outline the many arguments that support a resolution of these claims for a settlement valued at $17.2 million.

## I. Overview

Over the course of our settlement discussions, the United States has insisted that CoCa's liability at Gilt Edge must be evaluated consistent with the settlement formula it used in prior settlements negotiated with other PRPs. However, all of those PRPs had significantly more involvement and exposure at the Site than CoCa.[2] The United States' settlement formula also ignores the indisputable historical fact that the environmental concerns at the Site are directly attributable to the activities of non-settling parties, particularly Brohm Mining Corporation and its subsidiaries, and the pre-World War II mine operators, none of which have contributed any funding to the cleanup, because of bankruptcy or otherwise. The formula assigns a

[1] Contributions to the settlement on behalf of Hecla and CoCa are subject to board of director approval.
[2] CERCLA does not require that settlements with different parties related to the same site be consistent. *See, e.g., United States v. Union Elec. Co.*, 934 F. Supp. 324, 331 (E.D. Mo. 1996) (United States not bound by the allocation formula used in earlier settlements in the same case).

large share of liability to whoever is extant, regardless of involvement or impact at the Site, and ignores what are now pretty well established principles of divisibility and apportionment that will control if this case gets litigated. When these principles are applied to the facts at Gilt Edge, CoCa's liability, and Mr. Congdon's liability, are astonishingly small in comparison to the United States' current settlement demands. The equities in a settlement context similarly favor CoCa and Mr. Congdon.

## I. Apportionment

We believe CoCa's apportionment case is strong and will prevail in litigation.[3] Thus, a settlement in excess of CoCa's costs of defending itself remains difficult to justify. CoCa has explained its position on apportionment in several meetings with the United States, so we only summarize the key points here. The apportionment analysis starts with Section 433A of the Restatement (Second) of Torts (the "Restatement"), which states that "[d]amages for harm are to be apportioned among two or more causes where (a) there are distinct harms, or (b) there is a reasonable basis for determining the contribution of each cause to a single harm." The United States has consistently claimed that Gilt Edge does not present a proper case for apportionment because there is a single harm at the site, while ignoring the fact that there is a reasonable basis on which to determine the contribution of each cause to that harm.

The alleged harm at Gilt Edge is acid rock drainage ("ARD"). Under section 1(b) of the Restatement, damages resulting from that harm can be apportioned if there is a reasonable basis for determining the contribution of each cause to ARD. Here, the volume of mining-related material produced by each party can be readily determined from available information. Based on data the United States itself has assembled, the volume of potential ARD-generating material that CoCa might be responsible for consists of exploratory drillhole cuttings that account for approximately .0148 % of the ARD-generating source material at Gilt Edge.[4] *See* July 9, 2014 Settlement Presentation by CoCa Mines and Hecla Limited. Assuming the United States would seek to recover approximately $160 million in litigation, CoCa's apportioned share, properly calculated, amounts to $24,000.

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[3] Recent decisions by the 7th Circuit Court of Appeals and the District Court for the Eastern District of Wisconsin buttress CoCa's position that volumetric evidence provides a reasonable basis for apportionment. *See United States v. P.H. Glatfelter Co.*, 768 F.3d 662 (7th Cir. 2014); *United States v. NCR Corp.*, No. 10-C-910, 2015 WL 2350063 (E.D. Wis. May 15, 2015) (utilizing a "simple volumetric approach to divisibility.")

[4] CoCa continues to dispute that drillholes or drillhole cuttings have resulted in the generation of ARD at Gilt Edge.

## II. Allocation

Under an equitable allocation approach, CoCa's exposure is similarly inconsequential. As a threshold matter, when the facts are fully considered, CoCa's property interests at Gilt Edge do not qualify as an ownership interest under CERCLA. Second, the United States' allocation fails to account for the primary causes of ARD generation at the site, focusing instead on the unlikely position that drillholes are causing the EPA to incur hundreds of millions of dollars in cleanup costs. Third, even if CoCa's interests qualified it as a CERCLA owner, CoCa largely divested itself of those interests in 1983, when it entered into a Mining Agreement (the "Mining Agreement") with Lacana Mining, Inc., not 1986, as the United States claims. Finally, the United States has ignored additional equitable considerations, including CoCa's limited role and involvement at the Site and the involvement of the United States and South Dakota in managing waste materials at the Site.

### a. CoCa was Not an Owner at Gilt Edge[5]

The United States assumes that a lessee of real property is automatically a CERCLA "owner." However, that simply is not the case. Under the correct legal test, the record in this case demonstrates that when CoCa's property interests are properly evaluated in light of the facts, the company does not qualify as an owner under CERCLA.[6]

While lessees have been found liable as CERCLA owners in limited circumstances, no court reaching that conclusion has based its decision solely on the mere existence of a lease. Some courts have required that the lessee exercise control over the site to essentially the same extent as the fee title holder. *See, e.g., United States v. A & N Cleaners*, 788 F. Supp. 1317, 1333-34 (S.D.N.Y. 1992) (finding lessee was a CERCLA owner where it exercised complete control over the use and occupation of the premises on a day-to-day basis); United States v. TIC Inv. Corp., 866 F. Supp. 1173, 1178 (N.D. Iowa 1994), *rev'd in part on other grounds*, 63 F.3d 1082 ("[w]here a lessee has no authority to control the activity causing damage, he is not liable"); *Delaney v. Town of Carmel*, 55 F. Supp. 2d 237, 258-59 (S.D.N.Y. 1999) (accord); *South Carolina Recycling & Disposal, Inc.*, 653 F. Supp. 984, 1003 (4th Cir. 1988) (lessee was a CERCLA owner because it "maintained control over and responsibility for the use of the property").

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[5] CoCa was never an operator at Gilt Edge. *See* August 19, 2014 letter from E. Temkin and J. Middleton to H. Hoffman regarding CoCa's lack of liability as an operator, and the discussion below, regarding CoCa's lack of authority under its agreement with Cyprus Mines, Inc.

[6] Like CoCa, Thomas Congdon's property interests at Gilt Edge fall far short of those required for CERCLA ownership.

Other courts require that, in addition to exercising control over the site and its use, the lessee must also hold other indicia of ownership. *See, e.g., Commander Oil Corp. v. Barlo Equip. Corp.*, 215 F.3d 321, 330-31 (2nd Cir. 2000). These courts recognize that "the typical lessee should not be held liable as an owner," *Commander Oil*, 215 F.3d at 329, and consider factors such as the length of the lease; the lessee's ability to terminate the lease; whether the leasehold included all of the property at issue; the lessee's permitted use of the premises; the ability to sublet or grant easements in the premises; the responsibility for maintenance, upkeep and taxes and other factors. *See id.* at 330-32; *see also Next Millennium Realty, L.L.C. v. Adchem Corp.*, 2014 WL 5425488 (E.D.N.Y. Oct. 22, 2014) (finding no liability where lessee's 20 year lease did not give it sufficient rights to qualify as an owner)Under either test, CoCa does not qualify as a CERCLA owner at Gilt Edge.

As we have previously explained, under the 1975 Joint Venture Agreement (the "1975 Agreement") between Cyprus Mines, Inc. and Congdon & Carey Ltd. No. 5 ("C&C5"), Cyprus was given "the exclusive right to possession, management and control" of all the properties subject to the 1975 Agreement, which included all the properties that CoCa held any interest in—whether through a lease or otherwise—at Gilt Edge. *See* 1975 Agreement at Article 2. Article 5 also gave Cyprus "full, complete and exclusive control and supervision of the Joint Venture Properties and all exploration, development and production operations conducted thereon or therewith." Under Article 6, Cyprus alone was permitted to "manage, direct and control all exploration operations hereunder." CoCa, on the other hand, was limited to making non-binding recommendations through an advisory committee, and to receiving information regarding Cyprus' operations.[7] *See* Arts. 8 and 13. CoCa was also required to obtain Cyprus' approval of any transfer of CoCa's interests to third parties, unless to a parent or successor of CoCa. Art. 19. In sum, CoCa simply had no possession or control over any of the Gilt Edge properties. This fact alone precludes any conclusion that CoCa is liable at Gilt Edge as an owner.

CoCa's underlying leasehold interests in the Gilt Edge properties also fail to qualify as CERCLA ownership interests. First, the 1974 lease between Thomas Congdon and Commonwealth Mining Company (the "Commonwealth Lease") and the 1976 Lease between Northwestern Metal Company and C&C5 (the "Northwestern Lease") conveyed only limited interests for relatively short terms—15 years and potentially longer if minerals were produced in

[7] There is no evidence that the advisory committee ever met or that Cyprus routinely provided CoCa with information on its activities. In addition, the United States alleged in its August 23, 2012 Complaint against Cyprus that Cyprus was the CERCLA operator at the Site from 1975 to 1983, followed by Lacana from 1983 to 1986. There is no authority that we know of that supports an argument for two site operators under the relevant facts.

paying quantities, Commonwealth Lease at Art. 2.1; Northwestern Lease at Art. 2.1—in contrast with, for example, a "99 year ground lease," that at least two courts have suggested might support a finding of CERCLA ownership. *C.f. Commander Oil* at 330; *Next Millennium Realty* at *13. Second, both the lessors and lessees could terminate the leases prior to the expiration of their terms. Commonwealth Lease at Arts. 2.8, 2.10 and 6.1; Northwestern Lease at Arts. 2.9, 5.1. Third, both Commonwealth and Northwestern conveyed only specific, limited interests to their lessees. Under both agreements, the property was leased only for the purposes of mineral exploration, mining and related activities. Commonwealth Lease at Art. 2.1; Northwestern Lease at Art. 2.1. The lessees were granted only the "right to use so much of the surface or subsurface of the premises as may be reasonably necessary desirable or convenient in carrying out the purposes" of the lease as well as right to use some water at the properties. *Id.* at Art. 2.2. Neither Mr. Congdon nor C&C5 were granted exclusive possession or use of the premises. In fact, both Commonwealth and Northwestern specifically reserved timber and water for agricultural purposes. *Id.* Finally, under 1975 Agreement with Cyprus, Cyprus, rather than CoCa, assumed all of the obligations of the lessees, including any requirements to pay property taxes and assessments. 1975 Agreement at Art. 6.

The limited interests and rights conveyed under these leases fall far short of establishing de facto ownership of the leased properties. While Cyprus and CoCa eventually did acquire title to certain mining claims at Gilt Edge aside from those that were leased, Cyprus always had exclusive possession and control over those properties in accordance with the 1975 Agreement, as described above. Thus, the result is no different for those properties: CoCa's interests fall short of the indicia of ownership necessary to be a CERCLA owner.

**b. The United States' Formula does not Fairly Allocate Liability for Source Materials.**

The United States' allocation formula ignores the fact that the ARD issues at Gilt Edge are largely attributable to Brohm's open pit mining and heap leach operations, plus historic mining activities between 1870 and 1941. The primary sources of potential ARD-generating material at the Site include materials in the Ruby Repository, spent ore, waste rock and fill, and historic, underground workings and tailings. When these sources are accounted for, the volume of potential ARD-generating material that Brohm alone is responsible for amounts to approximately 17.3 million loose cubic yards, or over 99% of the total potential ARD-generating material at the Site. Historic mining activities account for another 107,000 loose cubic yards of potential ARD-generating material, primarily from underground workings. In comparison, CoCa and its predecessor, C&C5, produced approximately 809 loose cubic yards of material. Any fair

allocation of responsibility must take these facts into account, yet the United States formula focuses solely on drillhole volumes.

Additionally, the United States formula relies on the unsubstantiated and improbable claim that drillholes have created pathways that have enhanced the migration and generation of ARD at the site. On the contrary, the data and analysis undertake by EPA itself indicate that the major structural features of the site, including deformation zones, fractured bedrock and underground workings are the primary pathways for ARD migration, and that waste rock, tailings and other mining-related materials excavated and managed by Brohm or historic operators are the key sources of ARD generation. *See, generally,* January 14, 2014 Settlement Discussion Presentation by Czar, Inc., EnSci, Inc. and NewFields, LLC on behalf of CoCa Mines (discussing EPA's 2008 RI report, 2003 Groundwater Characterization Report and other key analyses of the Site prepared by the United States). It is telling in this regard that EPA's conceptual model of the Site fails to even mention drillholes as a factor in ARD generation or migration.

**c. CoCa Divested in 1983[8]**

In previous discussion with the United States, CoCa has insisted that its liability cannot extend beyond 1986, when it entered into an Acquisition Agreement (the Acquisition Agreement") with Gilt Edge, Inc. Under the Acquisition Agreement, CoCa and Cyprus agreed to sell, grant and convey all of their right, title and interest in the Mining Agreement and the claims that were subject to the Mining Agreement. That argument was focused on rebutting the United States' claim that CoCa must have retained some ownership interests beyond 1986 because it executed a quitclaim deed in favor of Brohm Mining Company in 1988.[9] However, when the 1983 Mining Agreement is considered fully and in context, it is clear that CoCa could not have held interests at the site sufficient for CERCLA ownership beyond June 1, 1983, when the Mining Agreement was executed. With respect to the leased properties (e.g., the Commonwealth and Northwestern Leases), both CoCa and Cyprus agreed to, and did "sell, assign, transfer and convey to [Lacana] all of their right, title and interest in and to [the leases], together with all rights incident and appurtenant thereto," subject only to several irrelevant reservations. *See* 1983 Mining Agreement at Art. 1.1. Lacana also assumed all of CoCa's and

[8] We understand that, for purposes of these settlement discussions, the United States considers Tom Congdon's CERCLA liability at Gilt Edge to be limited to liability as an owner of the site between 1975 and 1983.

[9] As we have previously explained to the United States, the quitclaim from CoCa to Brohm was a ministerial accommodation to assist with perfection of title to property at the Site, in accordance with Paragraph 1 of the 1986 Acquisition Agreement pursuant to which Cyprus and CoCa transferred their Gilt Edge interests. This is a common practice in these sorts of transactions.

Cyprus' obligations under the leases. *Id.* at Art. 1.2. Thus, to the extent that CoCa had any interest in the Commonwealth Lease and the Northwestern Lease sufficient to constitute a CERCLA ownership interest, that interest was clearly transferred to Lacana in 1983. Aside from the unequivocal language of the Mining Agreement itself, under the common law, this assignment terminated any privity of estate between CoCa and the lessors, thereby terminating any estate in the land that CoCa may have held. *See, e.g.*, 1 TIFFANY REAL PROP. § 121 (3d Ed.) ("The liabilities of the lessee, based upon the relation of landlord and tenant . . . necessarily continue only so long as that relation continues, and consequently come to an end upon the lessee's assignment of the leasehold interest, the assignee then becoming tenant in the lessee's stead."). Finally, under the CERCLA owner case law discussed above, there is no basis for holding CoCa liable as a CERCLA owner for the years 1983-1986.

With respect to mining claims held directly by Cyprus and CoCa, Cyprus and CoCa granted Lacana an exclusive lease to those claims:

> together with all rights, privileged and appurtenances in anywise belonging to said mining claims, including but not limited to easements, rights-of-way, access rights, road construction rights, water and water rights and timber and vegetative resources, together with the right to use the surface to the fullest extent reasonably necessary, appropriate, convenient, worthwhile or incidental to any of the rights and privileges of Grantee hereunder. The Claims are leased without limitation, for purposes of surveying, evaluation, exploration, additional prospecting, drilling, developing, mining by any method or otherwise extracting, stockpiling, storing, processing, treating, removing, striping and marketing or otherwise disposing of any and all minerals, metals, ores and materials of whatsoever kind and character in, upon, under or extending from or into the Claims.

*Id.* at Art. 1.3. Again, CoCa held no possessory interest in these claims or ability to control their use because those rights had been assigned to Cyprus under the 1975 Agreement. In any case, the 1983 transfer to Lacana likely extinguished any residual interest in these claims and any argument for CoCa ownership liability in the 1983-1986 timeframe.

**d. Other Considerations**

Several other considerations justify a small allocation to CoCa. Even if CoCa was found liable as a CERCLA "owner," its limited ownership interest and lack of control over the site

would distinguish it from the other PRPs who were actively involved in managing the property.[10] The United States also ignores the extensive case law consistently assigning less responsibility to owners who did not operate the site. *See, e.g., Waste Management of Alameda County, Inc. v. East Bay Regional Park District,* 135 F.Supp. 2d 1071 (N.D. Cal. 2001) (5% allocation to property owner who never operated landfill).

Second, throughout the course of our settlement discussions, the United States has implied that CoCa profited from its involvement at Gilt Edge, and that this supports a large settlement. The United States has provided no evidence that CoCa profited from activities at Gilt Edge and, in fact, the Gilt Edge property interests were sold at a loss. *See, e.g.*, January 31, 1983 Proxy Statement prepared in connection with the Agreement and Plan of Reorganization among CoCa Mines Inc., Congdon and Carey Ltd. 5, and St. Mary Parish Land Company, at p. 16 (produced by Thomas Congdon in response to EPA's June 21, 2010 request to Mr. Congdon).

Third, both the State and the United States approved exploration activities, permitted those activities, and had significant input at Gilt Edge before and during the Brohm years regarding the disposition of ARD generating source materials. Most notably, and beginning in the early 1990s, Brohm worked closely with the South Dakota Department of Environment and Natural Resources (SDDENR) on management strategies for relic ARD-generating tailings at the Site. *See, e.g.* Doc. No. BC20005613 (describing proposed relocation of the relic tailings); Doc. No. BC20005560 (addressing plans to move relic tailings from Strawberry Creek and place them elsewhere at the Site); Doc No. BC0042977 (discussing SDDENR approval of the technical revision to Brohm's mining permit allowing relocation of the relic tailings). These documents indicate that the State authorized Brohm to utilize ARD-generating materials for construction activities and relocate source materials in waste dumps at the Site, thereby contribution to more ARD generation. We also note the United States' extensive land holdings at the Site and its role in management of historic wastes and the expansion of Brohm's activities to Anchor Hill and the Anchor Hill pit. The extent of State and federal involvement in waste management decision further supports a smaller allocation for CoCa.[11]

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[10] These same factors also distinguish Mr. Congdon's ownership interests. Like CoCa, Mr. Congdon's interests were limited, and he exercised no control over the property.

[11] This consideration also support counterclaims against both the United States and South Dakota based on, at a minimum, their status as CERCLA "arrangers." *C.f. Nu-West Mining, Inc. v. United States*, 768 F. Supp. 2d 1082 (D. Idaho 2011).

## III. The United States' Federal Debt Collection Procedure Act Claim is Untenable.

The United States claims that it can obtain prejudgment or post-judgment relief against Hecla Limited under the Federal Debt Collection Procedure Act, 28 U.S.C. § 3001 et seq. (the "FDCPA," or the "Act"), by garnishing or sequestering Hecla's property for the $18 million book value of the Grouse Creek property, plus interest calculated from the 1993 transfer of Grouse Creek to Hecla. Both CoCa and Hecla believe that the likelihood of the United States succeeding on a FDCPA claim is remote.

First, there is no debt owing from Hecla to CoCa. From 1991 through 1993, Hecla invested approximately $37 million in the Grouse Creek project. This investment funded exploration drilling, construction of a tailings pond, construction of a mill and extensive environmental and permitting expenditures. On November 12, 1993, CoCa's board of directors unanimously authorized the transfer of the outstanding shares of Grouse Creek Mining Company to Hecla, CoCa's sole shareholder, and the quitclaim of any real property interest at the Grouse Creek site held by CoCa. This transfer reflected Hecla's 1991 acquisition of 100% of CoCa's shares for $30 million, and was in consideration of Hecla's investment of an additional $37 million in the Grouse Creek project. Following this transfer, Grouse Creek Mining Company was merged into Hecla and Hecla became the owner of the Grouse Creek Mine.

For accounting purposes, the transfer of the shares of Grouse Creek Mining Company by CoCa to Hecla also transferred CoCa's equity in Grouse Creek Mining Company ($16.9 million) to Hecla, as is reflected in the contemporaneous accounting records of both Hecla and CoCa.[12] There was no reason for Hecla, which was already funding millions of dollars in development work at Grouse Creek, with attendant development risks, to agree to pay CoCa Mines an additional $18 million: it did not do so, and the United States has not offered a credible explanation of why Hecla would have gratuitously assumed another $18 million in debt. Moreover, if called to testify, members of CoCa's board of directors at the time will confirm that the 1993 transaction was intended to transfer ownership of Grouse Creek Mining Company from CoCa to Hecla in consideration of the funds Hecla advanced towards the development of the Grouse Creek Mine. They will also confirm that there was no debt created or owed in return. The transaction simply was not treated between the two companies as a sale with monies owed. There is no promissory note or other agreement requiring a cash payment from Hecla to CoCa. The equity section of CoCa Mines' November, 1993 and December, 1993 consolidated balance

[12] *See* the December 1993 journal entry which states "To transfer the investment in Grouse Creek from the CoCa Books over to the Hecla Books," Bates No. 004507. The Grouse Creek ledger reflects a parallel journal entry. *See* Bates No. 004597.

sheets, as well as contemporaneous journal entries, show that CoCa did not contemplate that this transaction created a payment obligation for its parent. *See* Bates Nos. 004601-02 (Nov. 1993) and 004595-96 (Dec. 1993). If called to testify, Hecla employees will confirm that the use of intercompany accounts between Hecla and its subsidiaries reflecting Hecla's investments in those subsidiaries was a common practice for many years. They will also confirm that, beginning in 2007, Hecla undertook a company-wide initiative to clean up these intercompany accounts. This effort continued until early 2010. The reclassification of the intercompany account between CoCa and Hecla was in accord with the initiative to clean up all of Hecla's intercompany accounts. In other words, there is no debt owing from Hecla to CoCa and no effort has been made by either Hecla or CoCa to hide or erase any payment obligation to CoCa.

Second, to obtain prejudgment relief under the Act, the United States must prove extraordinary and exigent circumstances that compel seizure of assets before the government has proven its case at trial. *See U.S. v. Teeven*, 1992 WL 683683, *5 (D.C. Del 1992) (citing *Connecticut v. Dochr*, 111 S.Ct. 2105 (1991); *c.f. Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974)). This standard is highlighted by the Act's legislative history:

> The general question of the availability and breadth of pre-judgment remedies as opposed to post-judgment remedies is crucial: government seizures of assets or garnishment of wages **before a court judgment raises a host of constitutional, legal and equitable issues not usually encountered in the post-judgment context.** The United States Attorneys made a strong case that where an asset of a debtor may be concealed, converted or moved out of the country, a prejudgment seizure is warranted to preserve the asset. However, it is the **Committee's view that such seizures in the prejudgment context warrant "compelling" circumstances.** Thus, the Committee sought to limit the use of prejudgment remedies to instances where such a showing could be made to a court. Additionally, prompt and effective notice to the debtor was considered to be an essential incident to such **extraordinary remedial actions** where a judgment had not yet been rendered.

H.R. Rep. No. 736, 101st Cong., 2d Sess. 1, 29 (1990), reprinted in 1990 U.S.C.C.A.N. 6630, 6634-35 (emphasis added). Whether the United States alleges that the 1993 transaction or the 2010 reclassification support its FDCPA claim, those events took place years ago, and do not create an urgent need to extraordinarily address the United States' claims before trial of the underlying CERCLA case. The United States also has known about these events for years now

and has been comfortable enough about Hecla's wherewithal to defer any pre-judgment relief claim. Hecla is a well-funded public company, and if required by a court, could undoubtedly pay any money owed to CoCa in the ordinary course.[13] Accordingly, there simply are no extraordinary or exigent circumstances in this case, and the United States' claims can be resolved in the ordinary way – discovery and trial, *if, but only if,* the government prevails against CoCa at trial and, *if, but only if,* the United States then also prevails on a claim against Hecla.

Third, the Act provides that prejudgment seizure is proper only when the debtor has or is about to prevent the United States from recovering on a debt owed to it by fleeing the jurisdiction, disposing of or secreting assets, or evading service of process. 28 U.S.C. § 3101(b); *N.L.R.B v. E.D.P. Med. Comp. Syst., Inc.*, 6 F.3d 951, 955-56 (2nd Cir. 1993). CoCa and Hecla are corporations that reside in the United States, and neither company has done anything to hide, secrete or make any debt owed unavailable for collection if the government prevails at trial in the underlying CERCLA case. As described above, there is no debt owed and there is no evidence of inappropriate behavior in connection with any debt.

Finally, under the Act the United States must also prove the probability of success on its underlying case – that CoCa is liable to the United States for a large CERCLA judgment. But as described above, CoCa never operated the Gilt Edge Mine and did not hold sufficient property interests to qualify as a CERCLA owner. The liability that might fairly be allocated to Coca for its limited involvement with the Site is substantially less than the $18 million plus interest that the government claims it can garnish or sequester.

## IV. Conclusion

The potential liabilities here, whether viewed from an apportionment or allocation perspective are simply not great enough to justify a settlement greater than the $17.2 million offer that we have been able to assemble. CoCa and Mr. Congdon were not owners or operators at Gilt Edge. Hecla does not owe CoCa any debt. Any exposure at the Nelson Tunnel site is subject to an analysis similar to what is presented here for Gilt Edge. The settling parties also have counterclaims against the United States and the State of South Dakota at Gilt Edge. (We have not yet explored the federal and state roles historically at the Nelson Tunnel site.) Finally,

[13] In this regard, we also note that the Act permits prejudgment seizure only if there is no alternative for protecting the United States' ability to collect a debt owed to it. 28 U.S.C. § 3101(d)(2)(iv). Hecla's ability to satisfy a judgment if necessary demonstrates that the U.S. has alternatives to prejudgment relief.

there is no basis for the United States' FDCPA claim in this matter, whether for prejudgment relief or otherwise. We have all worked very hard to get to this point, and your assistance and cooperation are appreciated. We do hope you find acceptable the settlement proposal these parties have worked hard to provide.

Sincerely yours,

Elizabeth H. Temkin
Joseph G. Middleton

EHT/JGM/jli

cc: David Sienko, Esq.
Howard Kenison, Esq.